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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RICHARD GOMEZ et al., Defendants and Appellants.	B168688 (Los Angeles County Super. Ct. No. BA230628)

APPEAL from judgments of the Superior Court of Los Angeles County. Alice E. Altoon and Curtis Rappe, Judges. Affirmed with directions.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant Richard Gomez.

Christine Vento, under appointment by the Court of Appeal, for Defendant and Appellant Manuel Perry.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Kyle S. Brodie and Richard T. Breen, Deputy Attorneys General, for Plaintiff and Respondent.

Richard Gomez (Gomez) and Manuel Perry (Perry) appeal from the judgments entered upon their convictions by jury of two counts of carjacking, two counts of robbery, and two counts of kidnapping for ransom, with findings that Gomez personally used a firearm as to each count. (Pen. Code, §§ 215, subd. (a), 211, 209, subd. (a), 12022.53, subd. (b).)[1] Each appellant was sentenced to two consecutive terms of life without the possibility of parole on the kidnapping for ransom counts, with sentences on the remaining counts stayed pursuant to section 654. In addition, Gomez was sentenced to firearm use enhancements of 13 years four months.

Gomez contends (1) that the trial court erred in denying his motion to suppress evidence seized in a warrantless arrest and search in a residence; (2) that his sentence of life without parole for kidnapping for ransom must be vacated because the kidnapping for ransom statute, section 209, subdivision (a), is internally conflicted, and it is not possible to determine whether the jury found all the requisite elements of the aggravating circumstance beyond a reasonable doubt; (3) that his sentence of life without parole violates the California Constitution; and (4) that the abstract of judgment must be corrected to delete reference to a parole revocation fine. In addition, he adopts each of the arguments raised by Perry.

Perry contends (1) that in the absence of a unanimity instruction pursuant to CALJIC No. 17.01, the jury's findings subjecting him to the enhanced penalty on the kidnapping for ransom counts must be reversed; (2) that the findings on the aggravating circumstances as to the kidnapping for ransom counts must be stricken because the requirements of *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) were not met; (3) that the trial court failed to instruct on false imprisonment by violence or menace and on simple kidnapping as lesser included offenses of one of the counts of kidnapping for ransom; (4) that the evidence was insufficient to satisfy the requisite elements for imposition of a life without parole sentence as to the kidnapping for ransom counts; (5) that the mandatory life without parole sentence for kidnapping for ransom is cruel or

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1 All further statutory references are to the Penal Code unless otherwise indicated.

unusual punishment; and (6) that the trial court abused its discretion in failing to dismiss the life without parole enhancements pursuant to section 1385. In addition, he joins and adopts by reference all issues raised by Gomez which may accrue to his benefit.

We affirm the judgments and direct the trial court to correct the abstract of judgment as to each appellant to strike the reference to a $1,000 parole revocation fine.

FACTS

We view the evidence in accordance with the usual rules on appeal. (*People v. Snow* (2003) 30 Cal.4th 43, 66.) On the afternoon of April 21, 2002, Juan Macias (Macias) and Jorge Perez (Perez) were driving out of Rose Hills Park in Macias's Ford F-150 when their exit was blocked by a black Honda driven by appellant Gomez. Gomez got out of the Honda, pointed a semiautomatic handgun at Macias's face, and ordered him to put the truck in park and hand over his money. A second, unidentified, man approached Perez and demanded money. Perez gave the man approximately $100 from his pocket, a watch, and a cell phone, and Macias gave Gomez his wallet as well as approximately $500 from his pocket. Appellant Perry, who was holding a semiautomatic handgun near his waist, then approached Macias, demanded money, and punched him twice in the face. Macias told him he had no more money. The assailants ordered Macias and Perez to get into the back seat of Macias's truck. Neither Macias nor Perez had ever seen the kidnappers before.

Gomez drove off in the Honda and Perry followed him in Macias's truck, with the victims in the truck's back seat and another armed man sitting in the front passenger seat. After approximately five minutes, the two vehicles arrived at another park, where Gomez demanded that Macias give him all his money. When Macias said he had already given Gomez everything, Gomez said, "It's not over then."

Gomez drove north on the 110 Freeway, followed by Perry in Macias's truck. The victims asked Perry to just take the truck and let them go, but Perry said, "Shut the fuck up or I'll blow your head off." After two or three minutes, the two vehicles stopped momentarily at an apartment building where Perry, who had vomited, said he was going to change his shirt. Macias and Perez were told to get on the floor of the truck and put

their heads down. Macias testified that up to this point, for the prior 10 or 15 minutes, he had been able to get a good look at Gomez and Perry.

When Perry returned, he said, "Let's roll to 43rd," and Macias and Perez were driven for approximately five to 10 more minutes. Appellants then ordered them out of the truck and into a house. Macias was told to lie on the hardwood floor and Perez was thrown to the floor. As Gomez walked Perez into the house, he said, "This is it. This house is already paid just to kill you."

The kidnappers covered Macias's and Perez's heads with heavy towels. Gomez said to Macias, "Where have you been? I've been waiting for you. You know, you fucked up. . . . I already called my boss and he's on his way." Gomez telephoned someone named "Big Dog" and stated, "I got them here. Come and take a look." He told Big Dog to bring a picture. A while later, Macias's towel was removed and Gomez, in the presence of Perry, compared Macias to a photograph. Big Dog, who was also present, agreed that "that's him." The towel was then put back over Macias's head. Gomez told Big Dog that Perez was Macias's "gunner." Gomez lifted Perez's towel. Big Dog kicked Perez in the face, then covered his head again.

Macias was repeatedly punched and kicked in the back over a period of an hour. The blows were inflicted by more than one person at a time. Perez, who was lying on the floor next to Macias, heard Macias screaming, and he felt Macias's blood on his hands. Macias was burned on the back two times with a cigarette, resulting in scars. He testified that he heard Perry talking at the time, but could not see anything because his head was still covered.[2]

After telling Macias that he had "fucked up," Gomez said they would give him another chance and asked him for $20,000. Macias said he did not have that kind of money. Gomez told him that he had better get the money and that he could make one phone call. Macias called a friend, Jesus Iribe (Iribe), on Iribe's cell phone and, crying,

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[2] Detective James Martin, one of the officers working on the ongoing investigation, testified without objection that Macias stated that Perry was the person who burned him on the back with a lit cigarette.

told him he needed $20,000. Gomez got on the phone and told Iribe that if he wanted to see Macias and Perez alive again he should bring $20,000, and that he had an hour to bring the money to King Taco at Soto and Cesar Chavez.[3] Macias pleaded with Iribe to get the money somehow. Gomez repeated the demand to Macias's mother when Iribe walked across the street to Macias's home and put Macias's mother on his cell phone. Gomez warned Iribe to show up alone and not to call the police, stating that he had a scanner and would know if the police had been involved. Macias heard the sounds of a scanner in the house, and Iribe heard the sounds of a walkie-talkie radio over the phone.

After Iribe hung up, however, he immediately approached two police officers whom he saw at a neighbor's home and told them about the ransom demand. At the police station, he worked with several detectives and officers from the special investigations section. The kidnappers called Iribe a half hour later and told him they were ready to go to King Taco. Police officers listened in on the call. Iribe replied that he was not ready because he did not have the money. Iribe was contacted several more times by appellants, and, prompted by the officers, he repeatedly told them he did not have the money. Over the course of numerous calls, the kidnappers agreed to give Iribe more time and to accept a lesser amount of money. The kidnappers ultimately changed the meeting location to a gas station at 26th and Figueroa. The time for the exchange of money and hostages was set at 10:00 p.m. Meanwhile, the police decided on a plan of action and scouted the area of the proposed meeting.

After Macias was burned with the cigarette, he felt several metal objects being pressed to his back and felt a metal object that felt like a gun against his head. Perry told him that he had better come up with the money or "you guys are dead," and Macias heard the sound of a trigger being pulled and then heard a clicking sound, as if a gun had been fired but there were no bullets. Macias then heard Gomez say to the other men in the

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[3] Perez testified that Gomez gave Iribe two hours.

room that if he did not call within an hour, "you know what to do with them."[4] Macias heard a door open and close.

Several individuals remained in the room with Macias and Perez as they lay on the floor for an hour. One of the men took Perez's wallet from his pocket. Perry commented that the wallet contained a bank receipt showing a balance in the account, and one of the men asked Perez for the PIN for his ATM card. Perez gave Perry the information. Perry and the others discussed who was going to get the money and Perry told them that each would receive $100. One of the men subsequently called from the ATM and asked Perez how it worked. The man returned, and someone put a gun to Perez's head and asked for his "real PIN number." Perez repeated the number and explained how to use the machine. The individual left and returned again, stating that he could not obtain any money.

Eventually, Perry reported to the people in the house that Gomez was going to pick up the money at Soto and Cesar Chavez. The towel was taken off Macias's head. Someone hit Macias in the head twice with a gun, causing him to experience a lot of pain and to bleed heavily. The towel was placed back on his head.

After the 10:00 p.m. meeting time specified by the kidnappers had passed, Iribe, prompted by the police officers, continued to stall the kidnappers. The kidnappers agreed to accept $2,000 or $3,000, and the exchange was set for midnight at a Jack-in-the-Box restaurant on Figueroa and York. Iribe told them he would come in a silver van with a friend. His "friend" was actually Detective Joe Callian. Another detective was in the rear of the van, and other officers maintained surveillance around the restaurant.

Gomez returned to the house and stated that Macias's friend had come up with the money. Gomez called Big Dog and then explained to those in the house how they were going to pick up the ransom money. Gomez tied strips of cloth around the victims' eyes, although they were able to see through the fabric, and they were taken to the Honda. Gomez drove, and a woman subsequently identified as codefendant Reanita Bell (Bell)

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[4] Perez heard Gomez refer to a two-hour period.

sat in the front passenger seat. Both Gomez and Bell had semiautomatic handguns.[5] As he drove, Gomez told Macias and Perez that if Macias's friend played any games, Macias and Perez would be killed.

Gomez drove to different gas stations and made numerous phone calls to Iribe, telling him to drop off the money. At one point the victims heard Gomez say, "You're not here either. . . . Stop playing games or else you won't see your friends again." At this point, Iribe had not heard Macias's and Perez's voices for several hours. Gomez told Macias and Perez that Iribe wanted to be sure they were all right before he turned over the money. Gomez agreed to let Iribe see the victims, but he stated that he would not release them until he counted the money and that if something was wrong he would kill them.

Gomez pulled up alongside the silver van carrying Iribe and Detective Callian, which had been parked at the Jack-in-the-Box, so that Iribe could see Macias and Perez in the back seat of the Honda. Iribe and Detective Callian saw Gomez, who was driving the Honda, from a distance of only a few feet as the two cars drew up side by side, driver next to driver. The victims saw Iribe in the van, with another man in the driver's seat. Gomez said, "Let's do it here," but Detective Callian said no and drove off. Gomez asked Macias and Perez who the person with Iribe was, and Macias said it was one of their friends, although he had no idea who the person was.

The detectives observed the Honda pull up close to a red Toyota, which was driven by Perry. They then maintained surveillance on the Toyota as well. When Perry walked away from the Toyota, detectives approached him. Perry began to run, and, in a planned maneuver, a detective kicked him, causing him to drop his cell phone, so he could not tip off Gomez that the police were involved. Detectives drove the Toyota away, finding inside a walkie-talkie that could function as a police scanner. Perry was taken to the police station. A check of his shoes revealed blood on the soles. Detective Charles Bennett, who was supervising the operation, instructed the other officers that

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[5] Bell pled guilty to one count of simple kidnapping with use of a firearm. She is not a party to this appeal.

Iribe was to tell the kidnappers that he had given the ransom money to Perry and that if they did not receive it, it meant that Perry had ripped them off.

Gomez repeatedly called Iribe, telling him to stop playing games and to bring the money or Macias and Perez would be killed. Gomez sounded "[r]eal angry;" at that point Gomez was "always pissed off," and he told Iribe, "I don't give a fuck about your friends. And . . . if I don't get the money I'm going to kill them." Detective Callian, who could hear Gomez's voice, described Gomez as becoming progressively more aggressive, threatening to kill the victims if he did not receive the money.

Gomez called Perry and told him to pick up the money at the Jack-in-the-Box and then leave. He called Perry repeatedly, but Perry did not answer. Gomez also called Iribe and told him to give the money to Perry, who would be driving around in a red Toyota. Bell told Macias and Perez that, if something had happened to Perry, whom she called her "baby," they would be killed; Gomez told them that if they did not find Perry, he would kill them and drive around with their dead bodies in the car all night. Gomez drove around but could not find the Toyota, and he could not reach Perry by phone. He called Iribe and asked if the money had been delivered, and Iribe told him he had given it to Perry. Gomez asked Iribe for a description of Perry. Iribe gave Gomez a description of Perry, which he had obtained from the officers. Gomez did not call Iribe again after that.

Finally, Gomez called Big Dog, then pulled the Honda over and released Macias and Perez. They had been driven around for an hour or an hour and a half since they left the house blindfolded. Gomez and Bell removed the victims' blindfolds and told them not to look back or they would be shot. The Honda drove off. Macias and Perez were picked up by the police a few minutes later. Iribe observed that the victims looked "all beat up" and that their faces were "all swelled up." Their shirts were ripped, and Macias had no shoes.

Police officers, aided by a police helicopter, pursued the Honda as it drove off. Detective Bennett followed as Gomez and Bell entered through the locked security gate of an apartment building on Avenue 52. When the detective ordered them to stop, they

ran up the stairs into an apartment. The detective set up a police perimeter surrounding the building and called in the special weapons and tactics (S.W.A.T.) team. As people were evacuated from the building, Macias, Perez and Iribe, who had been brought to the scene, were asked if they could identify anyone. After several hours, Gomez and Bell were taken into custody, and Macias, Perez and Iribe identified them. Gomez was wearing underpants, a t-shirt, and socks at the time he was taken from the building.

Gomez had directed a detective to a bedroom to retrieve his pants and stated that he had approximately $600 in his pants pocket. The detective observed a pair of shoes next to the pants. The shoes were stained with blood. The pants, money and shoes were booked into evidence. DNA analysis established that the blood on both Gomez's and Perry's shoes was that of Macias, such that only one in 14 billion Hispanics would have the same DNA pattern. Macias's wallet, driver's license and identification cards were found in the Honda, as was a magazine for a nine-millimeter semiautomatic handgun that contained live ammunition. Macias's Ford F-150 was recovered but had been badly burned inside and out.

Macias and Perez were taken to a hospital, where they were "checked . . . out." Macias's head wound did not require stitches and he did not receive any medication. Macias and Perez each identified Perry from a photographic lineup the next day, and each subsequently identified Gomez from a live lineup.

Both appellants relied on defenses of mistaken identity. Each entered in evidence his booking photograph, taken on April 22, 2002.

DISCUSSION

I. Motion to suppress evidence

Gomez contends that the trial court erred in denying his motion pursuant to section 1538.5 to suppress evidence of his tennis shoes, which had blood stains, his pants, which contained $600, and the statements he made acknowledging ownership of these items. He argues that his Fourth Amendment rights were violated when the police did not obtain warrants for his arrest and to search the apartment he was in because no exigent

circumstances existed, given the four-hour delay before the arrest and search. This contention must fail.

We view the evidence at the hearing on the suppression motion in accordance with the usual standard of review. (*People v. Camacho* (2000) 23 Cal.4th 824, 830.) At approximately 2:00 a.m. on April 22, 2002, after the kidnap victims were let go from the Honda involved in the kidnapping for ransom, Detective Bennett and a police helicopter followed the Honda to an apartment house at 121 Avenue 52. As the detective pulled up next to the vehicle, a man, who was wearing blue pants, and a woman, who was wearing a brown dress, got out. Detective Bennett identified himself as a police officer and ordered the man and woman to freeze, but they ran into the building and entered an apartment on the top floor.[6] He could not see the door as they entered the apartment, but there was an exposed landing and he could tell which area of the building they were in.

Detective Bennett was aware, based on his observations and on information he had received, that the suspects were armed and violent. He set up a perimeter around the apartment building and called the S.W.A.T. team, because his unit was not trained or equipped to go after armed suspects in a locked apartment. It took a little over two hours for the S.W.A.T. team to arrive, because the commander of the team had to be awakened and advised of the situation, the commander had to summon his sergeants, who had to call their officers, and the men had to get their equipment, undergo briefing, and travel to the location. Detective Bennett was not aware of any attempt to obtain a warrant during the two hours he was waiting for the S.W.A.T. team to arrive. When the S.W.A.T. team arrived, at approximately 4:00 a.m., Detective Bennett was relieved of his duty on the perimeter. Before he left, he saw the S.W.A.T. officers begin to evacuate the building.

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[6] The leaseholder of the apartment testified that Gomez had her permission to spend the night at the apartment and that he came to drink some beers and hang out. A tape recorded interview of Gomez was played in which he stated that he was planning to leave for his home in Victorville after visiting at the apartment, but he had too much to drink and passed out. The trial court initially found, on the evidence before it at the time, that Gomez had standing. The trial court subsequently stated, "And he quite frankly doesn't really have standing. But if he did have standing, he gave consent."

At approximately 6:00 a.m., Detective John Licata arrived to transport Gomez for booking. Other officers had previously entered apartment K, placed Gomez and Bell in handcuffs, and conducted a protective sweep of the apartment. Gomez was wearing a t-shirt and underpants. Detective Licata told Gomez that he needed to get some clothes for him, and asked Gomez where they were. Gomez nodded, directing Detective Licata to one of the bedrooms. Detective Licata asked Gomez if there were any items of value that had to be secured before they left the apartment. Gomez replied that he had $600 in cash in the pocket of a pair of shiny blue pants. Detective Licata entered the bedroom to which Gomez had directed him and saw a pair of shiny blue pants in plain view on the floor, near a pair of men's tennis shoes. When Detective Licata picked up the shoes, he noticed a stain on the instep of one shoe and what appeared to be dried blood in the soles of both shoes. He took the shoes and pants back to where Gomez was being detained, and asked Gomez if the items were his. Gomez said yes. Detective Licata counted the money, which amounted to approximately $600, in front of Gomez. The shoes, pants, and money were booked into evidence.

Detective Licata was unaware of whether anyone had sought a search warrant for the apartment. At the time he arrived, three or four plainclothes detectives were there, but they were standing around, not searching the apartment. Detective Licata did not read Gomez his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 and did not know if another officer had done so.

In his written motion, Gomez's counsel argued that the evidence was obtained as a result of an illegal search and seizure in that it was obtained "by an entry and re-entry into the premises in which Mr. Gomez was arrested, unsupported by a search warrant or probable cause to enter without said warrant." His points and authorities began with the proposition that "[a] search without a warrant is presumptively illegal." He argued that "even if the initial entry was justified under one of the exceptions to the warrant requirement, a subsequent re-entry without a warrant is improper, and items observed or seized during the re-entry must be suppressed." The prosecutor's written opposition

asserted that Gomez lacked standing, but in any event the search was reasonable and the S.W.A.T. team had "probable cause due to exigent circumstances."

At the hearing, the prosecutor argued that the S.W.A.T. team had exigent circumstances and entered the apartment, placing Gomez in custody; that after Detective Licata entered, Gomez directed him to his pants and the $600; and that there was no evidence the detectives instituted a search. When the trial court questioned why there was no attempt to "wake up a magistrate," the prosecutor stated that the officers were only there to evacuate people and did not need a search warrant for that purpose.

Gomez's counsel argued, "They wanted to get a search warrant because they need to get the search warrant. The exigency and excuse going into the apartment and arresting these people and securing the premises. Beyond that they need to get a search warrant. I'd cite *People v. Le Blanc* to the court found at 60 Cal.App.4th 167 which points out that -- [¶] . . . [¶] And it's a case where -- well, the plain view doctrine only goes so far, and it only goes so far to see what's in plain view when you're -- when you have the right to be in the place that you're making the view from. [¶] So that's the situation we have here. The point that Detective Licata arrives, everybody's in custody. The exigency has ended. They don't have a right to go rummaging around the apartment without a search warrant or consent or some other -- well, without a search warrant or consent because the exigency has ended." Counsel cited additional cases, and added, "And this is a similar kind of situation that we have here. Once the exigency has ended, the officers had no right to continue to remain in the apartment and basically processing it as a crime scene."

The prosecutor stated, "I agree with [Gomez's counsel] that, you know, he said once exigency ends, you can't go search. But this wasn't a search. . . . [¶] But it's not like Detective Licata looked under things or moved anything. They were sitting right there in plain view."

After a discussion regarding Gomez's counsel's argument that Detective Licata violated Gomez's *Miranda* rights, Gomez's counsel stated, "Okay. Assuming the officer has the right to be on the premises at that point. . . . [¶] Well, I mean, that's --" The trial

court observed, "I believe that you've got a whole operation going on for four hours at that location. I can't imagine that [Detective Licata] wouldn't have a right to be there by that time. They follow them there. They've been evacuating people for two [hours]." Gomez's counsel reiterated, "I understand, but the exigency has ended. Why is he still there? Why are there detectives still milling around there?"

The trial court denied the motion to suppress, determining that there had been no search because Detective Licata had entered the bedroom at Gomez's direction in order to obtain Gomez's clothing and to secure Gomez's valuables, and the shoes were in plain view.

On appeal, Gomez contends that "the four (4) hour delay between [his] entry into the apartment and the warrantless police entry resulting in his arrest and subsequent search and seizure of items contained within the apartment, could not have been based on any 'exigencies'. A warrant to arrest and search could and should have been obtained prior to that entry. Thus, any consent which the trial court found implied from GOMEZ' actions in pointing out where his clothing could be located was begotten 'fruit' of otherwise unlawful police conduct."

Gomez observes that the trial court never formally ruled on the prosecution theory of exigent circumstances as a justification for the four-hour delay in effectuating the entry and arrest. That is true. The reason is that Gomez did not raise or argue this issue. He conceded the propriety of the warrantless entry and arrest, repeatedly stating that the exigency had ended and thus conceding that an exigency justified the initial entry. He attacked only the subsequent warrantless "search" by Detective Licata at the point after the exigency ended, which he termed the "subsequent re-entry." The issue raised on appeal is therefore waived. (*People v. Oldham* (2000) 81 Cal.App.4th 1, 14-15.)

Even were it not waived, we would have no difficulty finding that exigent circumstances excused the warrantless entry and arrest. "[W]arrantless arrests within the home are per se unreasonable in the absence of exigent circumstances. [¶] . . . '[E]xigent circumstances' means an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape

of a suspect or destruction of evidence. There is no ready litmus test for determining whether such circumstances exist, and in each case the claim of an extraordinary situation must be measured by the facts known to the officers." (*People v. Ramey* (1976) 16 Cal.3d 263, 275-276, fn. omitted.) This principle applies to the arrest of an individual in another person's residence. (*People v. Williams* (1989) 48 Cal.3d 1112, 1138.)

The "pertinent factors" in the determination as to whether exigent circumstances justify an arrest without a warrant are "the gravity of the offense involved; whether the subject of the arrest is reasonably believed to be armed; whether probable cause is clear; whether the suspect is likely to be found on the premises entered; and the likelihood that the suspect will escape if not promptly arrested." (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 122, judg. vacated and cause remanded on other grounds *sub nom*. *Bacigalupo v. California* (1992) 506 U.S 802.) These factors support the warrantless entry in this case.

Two persons known to be armed and violent, who had participated in the kidnapping of two men, were followed to an apartment building where they entered one of the apartments. The suspects were aware that the police were pursuing them. It was the policy of the police in this situation to summon a S.W.A.T. team to extricate them, and Detective Bennett immediately did so, maintaining a perimeter around the building in case the suspects attempted to escape. The persons inside the apartment posed a danger to both the police and others in the apartment building, who were likely to have been present and asleep at that hour, and there was the likelihood that the suspects would attempt to escape or to destroy evidence.

Obtaining a warrant at that hour of the night would doubtless have taken longer than the two hours it took for the S.W.A.T. officers to arrive. In *In re Elizabeth G*. (2001) 88 Cal.App.4th 496, officers commenced the process of obtaining a warrant at 12:15 a.m. and obtained the warrant at approximately 5:30 a.m. Quoting from *Illinois v. McArthur* (2001) 531 U.S. 326, 332, the court there acknowledged that this length of time, during which the police entered the minor's residence to secure it while a warrant was obtained, was not shown to be "'longer than reasonably necessary for the police, acting with diligence, to obtain the warrant.'" (*In re Elizabeth G*., *supra*, at pp. 500, 505-

506.) In *People v. Camilleri* (1990) 220 Cal.App.3d 1199, 1210-1211, the court cited testimony that obtaining a telephonic search warrant could take two hours when it determined that exigent circumstances existed. Under the circumstances presented here, despite the delay occasioned by the time required for the S.W.A.T. team to respond, the officers were fully justified in entering the apartment without an arrest warrant.

Detective Licata's entry to bring Gomez out of the building and to the police station was part of "'an uninterrupted police presence in [the residence] . . . .'" (*People v. McDowell* (1988) 46 Cal.3d 557, 564.) That no search was intended is demonstrated by the fact that when Detective Licata arrived, the officers who were present were just standing around, not searching the premises. (See *McDowell*, *supra*, at p. 563.) Accordingly, no search warrant was required. Moreover, as the trial court found, the ultimate seizure of evidence did not result from a search, since Detective Licata picked up the pants at Gomez's direction, and if there was a search, it was with Gomez's consent. (*People v. Siripongs* (1988) 45 Cal.3d 548, 566-567.) Once Detective Licata was lawfully in the bedroom, he observed the shoes, which appeared to have blood on them, in plain view on the floor next to the pants. (*Horton v. California* (1990) 496 U.S. 128, 136; *People v. Campobasso* (1989) 211 Cal.App.3d 1480, 1483.) The seizure of items in plain view, when the officer has a right to be in a position to have that view, is proper. (*People v. Block* (1971) 6 Cal.3d 239, 243.) Where no unlawful search and seizure occurred, the statements made by appellant were not therefore inadmissible. (*People v. Hernandez* (1988) 47 Cal.3d 315, 343; *People v. Massey* (1976) 59 Cal.App.3d 777, 783.)

Finally, even if the trial court erred in denying the suppression motion, any such error would be utterly harmless. Gomez claims that, absent the evidence sought to be suppressed, he would not have been convicted. He points to testimony that his booking photograph depicts him with a mustache and what his trial counsel described in his argument to the jury as "small little goatee," while Macias and Perez each described the driver of the Honda as not having facial hair. However, Gomez was identified not only by Macias and Perez, but also by Iribe and by Detective Callian, both of whom had

observed him at close range as their vehicles stood side by side, and Gomez was followed by police as he fled after releasing the victims from the Honda. Macias's property was found in the Honda that Gomez drove to the apartment where he was found. Gomez's counsel characterized the facial hair as something that "perhaps you wouldn't notice . . . if you glanced at him from a distance," and the prosecutor indicated, without objection, that Gomez's facial hair was "so much lighter than the hair on his head." That the jury considered the defense of misidentification is indicated by their request for a readback of testimony about Gomez's facial hair, but the defense was rejected. On this record we conclude that any error in the denial of the suppression motion would be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Siripongs*, *supra*, 45 Cal.3d at p. 567; *People v. McDowell supra*, 46 Cal.3d at p. 564.)

II. Section 209, subdivision (a)

Appellants were sentenced to consecutive terms of life without parole under the enhanced penalty provision of section 209, subdivision (a). Section 209, subdivision (a) provides as follows: "Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away another person by any means whatsoever with intent to hold or detain, or who holds or detains, that person for ransom, reward or to commit extortion or to exact from another person any money or valuable thing, or any person who aids or abets any such act, is guilty of a felony, and upon conviction thereof, *shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers death or bodily harm, or is intentionally confined in a manner which exposes that person to a substantial likelihood of death, or shall be punished by imprisonment in the state prison for life with the possibility of parole in cases where no such person suffers death or bodily harm.*" (Italics added.)

The jury was instructed that if it found appellants guilty of kidnapping for ransom, it "must also find whether the victims suffered bodily harm in connection with or as a result of an act done by the defendants in the commission of the crime or the defendants intentionally confined the person kidnapped in a manner which exposed that person to a

substantial likelihood of death" and that it was to "state [its] decision in that respect in [its] verdict." The verdict forms indicated that the jury found true as to each appellant the allegation that each victim, "while being subjected to said kidnapping, suffered bodily harm or was intentionally confined in a manner which exposed him to a substantial likelihood of death, within the meaning of Penal Code section 209(a)."

Appellants raise several issues with respect to the findings on the enhanced penalty provision. We discuss each issue in turn.

Apprendi

Appellants assert that the language of section 209, subdivision (a) governing the requirements for invoking the life without parole sentence contains an internal inconsistency: the statute provides for a sentence of life without parole "in cases in which any person subjected to any such act suffers death or bodily harm, or is intentionally confined in a manner which exposes that person to a substantial likelihood of death," but it then states that the punishment shall be "imprisonment in the state prison for life with the possibility of parole in cases where no such person suffers death or bodily harm." Appellants argue that, to be internally consistent, the phrase "intentionally confined in a manner which exposes that person to a substantial likelihood of death" should also have been included as part of the last clause, and that, in its absence, under accepted rules of statutory construction, favoring the defendant where the meaning is susceptible of two reasonable interpretations, the statute must be read to provide for the penalty of life without parole only where the jury has found that the victim suffered death or bodily harm.

Section 209, subdivision (a) originally did not include the phrase "or is intentionally confined in a manner which exposes that person to a substantial likelihood of death." That language was added by amendment in 1982. Although several courts have discussed the purpose of the 1982 amendment to section 209 (see discussion, *post*), none has been presented with the issue raised here.

In *Apprendi*, *supra*, 530 U.S. 466, the Supreme Court held that, consistent with the requirements of due process, "[o]ther than the fact of a prior conviction, any fact that

increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, *supra*, 530 U.S. at p. 490.) Appellants argue that if a jury is presented with alternate theories, one that is legally correct and one that is legally incorrect, and the reviewing court cannot determine from the record which theory the jury's verdict rests upon, the conviction cannot stand. (*People v. Green* (1980) 27 Cal.3d 1, 69, disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3; see *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129.) Appellants claim that, in light of the jury's general verdict on the enhancement allegation, it cannot be determined whether the jury found unanimously that a victim suffered death or bodily harm, which would support a life without parole sentence, or whether the jury found that a victim was intentionally confined in a manner that exposed him to a substantial likelihood of death, which, they assert, would not support that sentence. Therefore, pursuant to *Apprendi*, they claim that their rights to due process were violated and their sentences of life without parole must be vacated.

To determine whether, as appellants claim, the jury was presented with a theory that is legally incorrect, we must determine whether findings that a victim was intentionally confined in a manner that exposed him to a substantial likelihood of death may properly support the sentence of life without parole. "As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose. [Citation.] We begin by examining the statute's words, giving them a plain and commonsense meaning. [Citation.] We do not, however, consider the statutory language 'in isolation.' [Citation.] Rather, we look to 'the entire substance of the statute . . . in order to determine the scope and purpose of the provision . . . .' [Citation.]' [Citation.] That is, we construe the words in question '"in context, keeping in mind the nature and obvious purpose of the statute . . . ."' [Citation.]' [Citation.] We must harmonize 'the various parts of a statutory enactment . . . by considering the particular clause or section in the context of the statutory framework as a whole.' [Citations.]" (*People v. Murphy* (2001) 25 Cal.4th 136, 142.)

In construing a statute, "[w]e must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*People v. Jenkins* (1995) 10 Cal.4th 234, 246.)

Considering the entire substance of the statute in issue, and to avoid an absurd result, we conclude that the statute is not inconsistent or "conflicted," as appellants claim. While the "substantial likelihood of death" language does not appear in the final clause of the provision, which states that a defendant shall be punished by life in prison *with* the possibility of parole "where no such person suffers death or bodily harm," we harmonize the language of both clauses describing the punishment under this subdivision, in light of the purpose of the statute, which was amended to add the "substantial likelihood" language to the provision for the life without parole sentence. We conclude that, despite the absence of parallel language in the final clause, the life without parole penalty is applicable both where "any person subjected to any such act suffers death or bodily harm" and where he "is intentionally confined in a manner which exposes that person to a substantial likelihood of death." Any other interpretation would render the "substantial likelihood" language in the "shall be punished by imprisonment in the state prison for life without possibility of parole" clause a nullity.

Assuming, however, that the statutory language is ambiguous and is susceptible of two reasonable interpretations, as posited by appellants, "'"we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part."' [Citation.]" (*People v. Jefferson* (1999) 21 Cal.4th 86, 94.)

As indicated, section 209, subdivision (a) was amended in 1982 to add the phrase "or is intentionally confined in a manner which exposes that person to a substantial likelihood of death." That language was added in response to the opinion in *People v. Schoenfeld* (1980) 111 Cal.App.3d 671, the case involving the infamous Chowchilla kidnapping in which numerous children were confined in a buried van. (See *People v.*

Centers (1999) 73 Cal.App.4th 84, 93.) In *Schoenfeld*, the court held that the enhanced penalty was inapplicable under the statute as it then read, providing for the sentence of life without parole only where the kidnapping resulted in death or bodily harm to a victim, because the injuries suffered by the children, nose bleeds, upset stomachs and fainting, did not constitute bodily harm. (*Schoenfeld*, at pp. 679, 687-689.)

The "substantial likelihood" language was added "to provide for life without parole in cases such as Chowchilla where the confinement underground was unquestionably life-threatening, but where the victims did not in fact suffer substantial physical injuries." (Assem. Com. on Criminal Justice, Analysis of Assem. Bill No. 1188, hearing date Apr. 26, 1981.)[7] The court in *People v. Serrano* (1992) 11 Cal.App.4th 1672 recognized that by adding the substantial likelihood language, the Legislature "responded to the Chowchilla case by extending the enhanced penalty to situations where the victim was not injured, but put at increased risk," and thereby "plainly meant to enhance punishment for a kidnapper who intentionally increases, by a certain degree, the risk of death otherwise inherent in kidnapping. [Citation.]" (*Id*. at p. 1676.) Similarly, the court in *People v. Centers*, *supra*, 73 Cal.App.4th 84 stated that by amending the statute to add the substantial likelihood language, "[t]he Legislature evidently intended to permit the imposition of life without the possibility of parole in any future case similar to *Schoenfeld*." (*Id*. at p. 93.)

The intent of the Legislature is unmistakable. The amended statute provides for the penalty of life without parole not only in circumstances where the victim suffered death or bodily harm, but also under circumstances where the victim did not suffer bodily harm but was intentionally confined in a manner which exposed that person to a substantial likelihood of death. The omission of the "substantial likelihood" language in the last clause of subdivision (a) of section 209 does not indicate that the Legislature intended that a defendant be eligible for parole when he intentionally confines his victim

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[7] We take judicial notice of the legislative history of the amending legislation, Statutes 1982, chapter 4, section 1. (*People v. Muszynski* (2002) 100 Cal.App.4th 672, 681, fn. 15.)

in a manner that exposes the victim to a substantial likelihood of death. Had the Legislature intended parole to be available in this situation, it would not have amended the statute to add the "substantial likelihood" language. Appellants' interpretation renders the amendment a nullity. The statute must be read to provide for a sentence of life without parole either where the victim suffers death or bodily harm, or where the victim is intentionally confined in a manner which exposes that person to a substantial likelihood of death.

Thus, the jury was not presented with two theories of which one was legally correct and one legally incorrect in terms of rendering appellants subject to a term of life without parole. Commission of a kidnapping where the victim is intentionally confined in a manner which exposes that person to a substantial likelihood of death, as well as one where the victim suffers death or bodily harm, warrants the punishment of life without parole. Since the jury found appellants guilty of violating section 209, subdivision (a), and further found as to each that each victim "suffered bodily harm or was intentionally confined in a manner which exposed him to a substantial likelihood of death," the punishments imposed did not violate the strictures of *Apprendi*.[8]

Unanimity instruction

As indicated, the jury was instructed that if it found appellants guilty of kidnapping for ransom, it "must also find whether the victims suffered bodily harm in connection with or as a result of an act done by the defendants in the commission of the crime or the defendants intentionally confined the person kidnapped in a manner which exposed that person to a substantial likelihood of death" and that it was to "state [its] decision in that respect in [its] verdict." The prosecutor argued both theories and told the jury that it could find "one or the other."

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8 To the extent Gomez's *Apprendi* claim encompasses the complaint that the verdict was not unanimous as to which act supported the conviction, that issue is discussed below.

Appellants contend that the trial court erred in failing to instruct the jury, sua sponte, in accordance with CALJIC No. 17.01[9] on the requirement of unanimity with respect to both theories underlying the enhanced penalty, that the victims suffered bodily harm and that the defendants intentionally confined the victims in a manner that substantially increased their risk of death. They claim that they were thereby denied due process because the instructional error misstated the requirement of proof beyond a reasonable doubt. This contention lacks merit.

"In a criminal case, a jury verdict must be unanimous. [Citation.] . . . Additionally, the jury must agree unanimously the defendant is guilty of a specific crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

However, "[a] requirement of jury unanimity typically applies to acts that could have been charged as separate offenses." (*People v. Maury* (2003) 30 Cal.4th 342, 422.) Where, as here, "the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty. [Citation.]" (*People v. Russo*, *supra*, 25 Cal.4th at p. 1132.) Thus, for example, if the evidence established the defendant's entry into two different houses in a burglary prosecution, the jury would be required to agree as to which house the defendant entered, but not as to whether he entered that house with

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9 CALJIC No. 17.01 provides as follows: "The defendant is accused of having committed the crime of ___ [in Count ___]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] [or] [omission] upon which a conviction [on Count ___] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he] [she] committed any one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count ___], all jurors must agree that [he] [she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict."

the intent to commit larceny or the intent to commit assault. (*Id*. at pp. 1132-1133.) Similarly, jurors need not agree as to whether the defendant was an aider and abettor or a principal, even where different facts support these designations (*Maury*, *supra*, at p. 423), and they need not agree as to the underlying felony, burglary or robbery, that would elevate a killing to first degree murder in a felony murder prosecution (*People v. Lewis* (2001) 25 Cal.4th 610, 654).

Therefore, appellants' jury was not required to agree on the theory -- bodily harm or confinement in a manner exposing the victim to a substantial likelihood of death -- underlying the finding supporting the enhanced penalty once it found appellants guilty of kidnapping for ransom. Due process was served by the requirement that the jury render a unanimous verdict on the penalty enhancement provision, whether or not it agreed on the theory underlying that finding. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1184; *People v. Briscoe* (2001) 92 Cal.App.4th 568, 591-592.)

Sufficiency of the evidence to establish the enhanced penalty

Finally, appellants contend that the evidence failed to support the jury's findings that either Macias nor Perez suffered bodily injury or that either victim was intentionally confined in a manner that exposed him to a substantial likelihood of death. This contention is without merit.

"The test for sufficiency of the evidence is whether, reviewing the whole record in the light most favorable to the judgment below, substantial evidence is disclosed such that a reasonable trier of fact could find the essential elements of the crime to be proven beyond a reasonable doubt. [Citation.] We must presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. [Citation.]" (*People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1232.)

In *People v. Centers*, *supra*, 73 Cal.App.4th at pages 94-95, the evidence was deemed sufficient to establish a substantial likelihood of death where the defendant pointed a loaded gun at the victim as he walked him to the car, pointed the gun at him while driving around, and threatened to shoot him if he did not obtain the money, if he did "anything 'funny,'" or if the police became involved. The *Centers* court pointed out

that "the jury was entitled to consider various possibilities even though they did not come to pass, including the possibility that defendant would shoot [the victim] because he could not come up with the money or because the police intervened."[10] (*Ibid*.)

Much the same set of factors was present in this case. Although Macias heard a clicking sound as if the gun or guns pressed against him contained no bullets when he was inside the house, a magazine containing live ammunition was found in the vehicle in which the victims were confined at gunpoint. Both Gomez and Bell held firearms while Gomez was driving. Gomez was observed to become increasingly angry and aggressive as the night wore on and as Iribe kept putting him off; Gomez had threatened to kill the victims if the police were involved or if Iribe played any games, and he repeatedly threatened to kill the victims while he drove them around for an hour or more waiting for the ransom money. Substantial evidence supports the determination that the victims were intentionally confined in a manner that exposed them to a substantial likelihood of death.

Moreover, Macias clearly suffered bodily harm.[11] The term has been construed as "requiring a substantial or serious injury to the body of the kidnapped victim by application of physical force that is beyond that necessarily involved in the forcible kidnapping. (See *People v. Schoenfeld*[, *supra*,] 111 Cal.App.3d [at p.] 681 [development traced and modern statement provided].)" (*People v. Castillo* (1991) 233 Cal.App.3d 36, 64.) We observe that the statute does not require that the defendant have personally inflicted the bodily harm or that he have personally done the acts by which the victim was intentionally confined in a manner exposing him to a substantial likelihood of death. Macias was burned with a cigarette, which left scars, and although his head

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10 We rejects appellants' claim that *Centers* should not be followed because it "allowed a LWOP sentence for a garden variety kidnapping at gunpoint." The additional factors present beyond mere use of a firearm justified the finding under the enhanced penalty provision in *Centers*, as they do in this case.

11 We observe that, during the discussion regarding jury instructions, Gomez's counsel challenged the "substantial likelihood" language in the kidnapping for ransom instruction, but he did not challenge the "bodily harm" portion of the instruction.

wound did not require stitches, he bled sufficiently for his blood to have spattered on Perez and to have been readily apparent on the shoes of both appellants.

Even if, as appellants argue, Perez did not suffer bodily harm, since the only evidence of his injuries was that Iribe observed that his face was "all swelled up" and that he was subsequently "checked . . . out" at a hospital, the reversal of the enhanced penalty finding on count 6, the kidnapping of Perez for ransom, is not required. (*People v. Guiton*, *supra*, 4 Cal.4th at pp. 1126-1131.) Whether Perez suffered bodily harm was a factual finding for the jury, which was fully equipped to determine the issue. Although the prosecutor argued both theories and stated that either theory would support the finding, she elaborated on the substantial likelihood of death theory, stating, "They were definitely exposed to a substantial likelihood of death if they did not get caught that night. [¶] If defendant Gomez did not finally believe that defendant Perry had that money make no doubt about it they would be dead." "The jury was as well equipped as any court to analyze the evidence and to reach a rational conclusion. The jurors' 'own intelligence and expertise will save them from' the error of giving them 'the option of relying upon a factually inadequate theory.' [Citation.]" (*Id*. at p. 1131.) Since a valid ground for the finding in count 6, the substantial likelihood of death theory, remains, and no indication appears in the record that the jury did not base its verdict on that ground, reversal is not warranted. (*People v. Marks* (2003) 31 Cal.4th 197, 233.)

III. Instruction on lesser included offenses

The trial court declined to instruct on false imprisonment and on simple kidnapping as lesser included offenses, stating, "[T]here has to be a factual basis for the jury to go down to the lesser and I don't think in this case that there is." Appellants contend that the trial court erred, thereby denying them their rights to due process and a fair trial, by failing to instruct the jury on false imprisonment by violence and on simple kidnapping as lesser included offenses of kidnapping Perez for ransom in count 6. Even

assuming, as appellants argue, that these crimes were lesser included offenses of kidnapping for ransom,[12] this contention is without merit.

A trial court has an obligation to instruct on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense are present and there is substantial evidence to justify a conviction of the lesser offense. The trial court has no such obligation when there is no evidence that the offense is less than that charged. (*People v. Breverman* (1998) 19 Cal.4th 142, 154, 162.) "[T]he existence of 'any evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed. [Citations.]" (*Id*. at p. 162.)

Appellants argue that the abduction of Perez was not committed with the specific intent to detain him for ransom, a requisite element of kidnapping for ransom. (See CALJIC No. 9.53.) They argue that the jury therefore could have found them guilty of one of the lesser offenses as to Perez. However, while it may be true, as they assert, that at the outset Perez was merely in the wrong place at the wrong time and that Macias was the target of the kidnapping for ransom scheme, the kidnappers did in fact abduct Perez along with Macias, and they made it clear that neither Macias nor Perez would be released unless the ransom was paid. The threats were made on the life of Perez as well as of Macias, and Perez was not released any earlier than Macias was. Appellants thus had the specific intent to detain or hold Perez for ransom. In the absence of any evidence

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12 While false imprisonment is a lesser included offense of kidnapping for ransom (*People v. Chacon* (1995) 37 Cal.App.4th 52, 65), simple kidnapping is not a lesser included offense of kidnapping for ransom under the statutory elements test, since forced movement is not an element of kidnapping for ransom, while it is required for simple kidnapping (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 368, fn. 56). However, the People agree with appellants that simple kidnapping was a lesser included offense of kidnapping for ransom in this case under the accusatory pleadings test, since the information alleged asportation. (*Ibid*.)

that the offense was less than that charged, the trial court did not err in refusing to instruct on the lesser offenses. (See *People v. Ordonez*, *supra*, 226 Cal.App.3d at p. 1233.)

IV. Sentencing

Cruel or unusual punishment

Each appellant contends that his consecutive sentences of life without parole constitute cruel or unusual punishment in violation of article 1, section 17 of the California Constitution. A sentence may be cruel or unusual under the California Constitution if it is "'so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.'" (*People v. Dillon* (1983) 34 Cal.3d 441, 478, quoting *In re Lynch* (1972) 8 Cal.3d 410, 424.)

In Gomez's written request that the trial court dismiss the "'bodily injury' enhancement" pursuant to section 1385, he argued that the life without parole sentence was disproportionate to other crimes in which life without parole was imposed. In Perry's written request for dismissal of the penalty enhancement pursuant to section 1385, he argued that the sentence would be an injustice. Although Gomez did not use the words "California Constitution," he has preserved the constitutional issue. Assuming, without finding, that Perry's failure to argue the unconstitutionality of the penalty constitutes a waiver of the issue on appeal (see, e.g., *People v. Kelley* (1997) 52 Cal.App.4th 568, 582-583) and that, as Perry alternatively argues, his trial counsel thereby provided ineffective assistance, we reject the latter contention as a ground for reversal for lack of prejudice. (*People v. Boyette* (2002) 29 Cal.4th 381, 430-431.)

Gomez claims that "when her [*sic*] individual culpability (conduct in committing the instant offense as well as her [*sic*] personal background) is measured against those who commit first degree intentional murder, that culpability deserves no greater punishment." He asks that we reduce his sentence to consecutive terms of 15 years to life, pursuant to *People v. Dillon*, *supra*, 34 Cal.3d 441. Perry claims that, considering the nature of the offense and the offender, his sentence is unconstitutional because there

was no evidence he seriously injured Macias or even touched Perez, and because he has a minimal criminal record.[13]

To determine whether the punishment is disproportionate, the court examines the nature of the offense and of the offender, "with particular regard to the degree of danger both present to society." (*In re Lynch*, *supra*, 8 Cal.3d at pp. 425-426.) In analyzing the nature of the offender, we consider his "age, prior criminality, personal characteristics, and state of mind[,]" and in analyzing the nature of the offense we consider the circumstances of the particular offense such as the defendant's motive, the way the crime was committed, the extent of his involvement and the consequences of his acts. (*People v. Dillon*, *supra*, 34 Cal.3d at p. 479.)

As appellants acknowledge, the penalty of life without parole for kidnapping for ransom, even for an aider and abettor, has been held not to violate the California Constitution. (*People v. Chacon*, *supra*, 37 Cal.App.4th at pp. 63-64; *People v. Castillo*, *supra*, 233 Cal.App.3d at pp. 65-68; *People v. Ordonez*, *supra*, 226 Cal.App.3d at pp. 1236-1237.) "'Because it is the Legislature which determines [the] appropriate penalty for criminal offenses, the defendant must overcome a "considerable burden" in convincing us that his sentence was disproportionate to his level of culpability. [Citation.]' [Citation.]" (*People v. Chacon*, *supra*, at p. 64.)

Appellants attempt to distinguish the above cases by pointing to the severe injuries inflicted by those defendants or, in the case of Ordonez, to the fact that his victim died, while the victims here did not suffer similarly severe injuries. Perry further argues that his only physical contact with either victim was when he punched Macias twice in the

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[13] Perry, who was 28 years old at the time of the offenses, had sustained juvenile petitions for property and weapons offenses commencing when he was 13 years old. He had several adult misdemeanor convictions and a felony conviction for evading an officer, for which his probation was revoked and he was sentenced to prison, followed by a felony conviction for spousal abuse, for which he was again sentenced to prison. Gomez, who was 27 years old at the time of the offenses, acknowledges his criminal record, which consisted of sustained juvenile petitions for property and weapons offenses commencing at the age of 15, and adult misdemeanor weapons convictions as well as a felony conviction of assault.

face at the outset of the incident.[14] Appellants also observe that, unlike other offenses resulting in life without parole sentences, their convictions did not require that they have had the specific intent to harm or kill the victims.

However, the evidence here established that, whether or not Macias's and Perez's actual injuries were as severe as those of the victims in the cited cases, and regardless of whether either appellant, or a third party, inflicted the injuries, both appellants intentionally and actively participated in the scheme in which they, assisted by several others, confined Macias and Perez in a manner that exposed the victims to a substantial likelihood of death. In a well-planned scheme involving several perpetrators, of whom Gomez and Perry were the most active and involved, with Gomez the apparent leader, the victims were abducted at gunpoint and were held for several hours in a house that had been "paid [for] just to kill [them]." During this time, their heads were covered, Perez was kicked in the face and Macias was kicked and beaten over a period of an hour, Macias was burned and was hit in the head with a gun, guns were put to their heads, and they were frequently threatened with death. They were then taken and driven around by Gomez, accompanied by codefendant Bell, for at least an hour, again at gunpoint, during which time Gomez, who was becoming ever more angry and aggressive, repeatedly threatened that he would kill them. When they were ultimately released, they appeared to have been beaten and their faces were swollen from their injuries. Nor were appellants' prior criminal records minimal. Appellants thus in no way resemble the immature, panicky 17-year-old defendant convicted of felony murder in *People v. Dillon*, *supra*, 34 Cal.3d 441, whose sentence was reduced to that for second degree murder. On this record, no constitutional infirmity appears in the sentence of either appellant.

Abuse of discretion in refusing to strike enhanced penalty findings

Appellants contend that the trial court abused its discretion in denying their motions pursuant to section 1385 to dismiss the findings that subjected them to the enhanced penalty provision of section 209, subdivision (a). Perry argues, as he did in his

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14 As indicated in footnote 2, *ante*, Macias told a detective that Perry was the person who burned him with a cigarette.

challenge to the constitutionality of his punishment, that he was not the "mastermind or the moving force," that the jury did not find that he personally used a firearm,[15] that there was no evidence he seriously injured Macias or even touched Perez, and that he has a minimal criminal record.[16] Although we reject the People's assertion that the issue is not reviewable on appeal (see *People v. Carmony* (July 9, 2004, S115090) __ Cal.4th ___ [DJ D.A.R. 8291]; *People v. Myers* (1999) 69 Cal.App.4th 305, 309), appellants' contention must fail.

A trial court has the authority to strike the findings under section 209, subdivision (a) that subject a defendant to enhancement punishment. (*People v. Marsh* (1984) 36 Cal.3d 134, 143.) "'The burden is on the party attacking the sentence to clearly show that [a trial court's] sentencing decision was irrational or arbitrary. . . . In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.'" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977-978.)

We reject Perry's attempt to downplay the extent of his participation and the effects of the kidnapping on the victims, and we reject his characterization of his record as minimal. In view of the intentional and well-planned kidnapping scheme in which both appellants were active participants, which included confinement of the victims in a manner that was substantially likely to result in their deaths, we find no abuse of discretion in the trial court's refusal to strike the findings as to either appellant.

Parole revocation fine

At sentencing, the trial court indicated that, in view of appellants' sentences of life without parole, it would not impose parole revocation fines pursuant to section 1202.45.

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[15] The jury was unable to reach a verdict on the firearm use enhancements as to Perry.

[16] Although Gomez joins in this issue, he offers no argument as to why the trial court abused its discretion in his case. Particularly in view of the extent of his participation, and for the reasons set forth below, we reject his claim as well as that of Perry.

Appellants contend, and the People agree, that the reference to a $1,000 parole revocation fine in each appellant's abstract of judgment must be stricken. (*People v. Mitchell* (2001) 26 Cal.4th 181, 188; see *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1183.)

DISPOSITION

The judgments are affirmed, and the trial court is directed to correct the abstract of judgment as to each appellant to strike the reference to a $1,000 parole revocation fine pursuant to section 1202.45.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

ASHMANN-GERST

We concur:

_____, Acting P. J.

NOTT

_____, J.

DOI TODD